

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 HEATH VINCENT FULKERSON,

4 Plaintiff,

5 v.

6 STATE OF NEVADA DEPARTMENT
7 OF BUSINESS AND INDUSTRY, et
8 al.,

9 Defendants.

3:20-cv-00400-MMD-CLB

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE¹

10 Before the court is Plaintiff Heath Fulkerson's ("Fulkerson"), application to proceed *in*
11 *forma pauperis* (ECF No. 1), his motion to submit complaint (ECF No. 1-2), and his complaint
12 (ECF No. 1-1). For the reasons stated below, the court recommends that Fulkerson's *in*
13 *forma pauperis* application (ECF No. 1) be granted, his motion to submit complaint (ECF
14 No. 1-2) be granted, and his complaint (ECF No. 1-1) be dismissed as outlined below.

15 **I. *IN FORMA PAUPERIS* APPLICATION**

16 A person may be granted permission to proceed *in forma pauperis* ("IFP") if the
17 person "submits an affidavit that includes a statement of all assets such [person] possesses
18 [and] that the person is unable to pay such fees or give security therefore. Such affidavit
19 shall state the nature of the action, defense or appeal and affiant's belief that the person is
20 entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir.
21 2000) (en banc) (stating 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner
22 actions).

23 The Local Rules of Practice for the District of Nevada provide: "Any person who is
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26 ¹ This Report and Recommendation is made to the Honorable Miranda M. Du, United
27 States District Judge. The action was referred to the undersigned Magistrate Judge pursuant
to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

1 unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP].
2 The application must be made on the form provided by the court and must include a financial
3 affidavit disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1.

4 "[T]he supporting affidavit [must] state the facts as to [the] affiant's poverty with some
5 particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir.
6 1981) (quotation marks and citation omitted). A litigant need not "be absolutely destitute to
7 enjoy the benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331,
8 339 (1948).

9 A review of the application to proceed IFP reveals Fulkerson cannot pay the filing fee;
10 therefore, the court recommends that the application (ECF No. 1) be granted.

11 **II. SCREENING STANDARD**

12 Prior to ordering service on any defendant, the Court is required to screen an *in forma*
13 *pauperis* complaint to determine whether dismissal is appropriate under certain
14 circumstances. See *Lopez*, 203 F.3d at 1126 (noting the *in forma pauperis* statute at 28
15 U.S.C. § 1915(e)(2) requires a district court to dismiss an *in forma pauperis* complaint for
16 the enumerated reasons). Such screening is required before a litigation proceeding *in forma*
17 *pauperis* may proceed to serve a pleading. *Glick v. Edwards*, 803 F.3d 505, 507 (9th Cir.
18 2015).

19 "[T]he court shall dismiss the case at any time if the court determines that – (A) the
20 allegations of poverty is untrue; or (B) the action or appeal – (i) is frivolous or malicious; (ii)
21 fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief against
22 a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(A), (B)(i)-(iii).

23 Dismissal of a complaint for failure to state a claim upon which relief may be granted
24 is provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii)
25 tracks that language. When reviewing the adequacy of a complaint under this statute, the
26 court applies the same standard as is applied under Rule 12(b)(6). See, e.g., *Watison v.*
27 *Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012) ("The standard for determining whether a

1 plaintiff has failed to state a claim upon which relief can be granted under § 1915(e)(2)(B)(ii)
2 is the same as the Federal Rule of Civil Procedure 12(b)(6) standard for failure to state a
3 claim.”). Review under Rule 12(b)(6) is essentially a ruling on a question of law. See
4 *Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

5 The Court must accept as true the allegations, construe the pleadings in the light
6 most favorable to the plaintiff, and resolve all doubts in the plaintiff’s favor. *Jenkins v.*
7 *McKeithen*, 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints
8 are “held to less stringent standards than formal pleadings drafted by lawyers[.]” *Hughes v.*
9 *Rowe*, 449 U.S. 5, 9 (1980) (internal quotations marks and citation omitted).

10 A complaint must contain more than a “formulaic recitation of the elements of a cause
11 of actions,” it must contain factual allegations sufficient to “raise a right to relief above the
12 speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading
13 must contain something more. . . than. . . a statement of facts that merely creates a suspicion
14 [of] a legally cognizable right of action.” *Id.* (citation and quotation marks omitted). At a
15 minimum, a plaintiff should include “enough facts to state a claim to relief that is plausible
16 on its face.” *Id.* at 570; see also *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

17 A dismissal should not be without leave to amend unless it is clear from the face of
18 the complaint the action is frivolous and could not be amended to state a federal claim, or
19 the district court lacks subject matter jurisdiction over the action. See *Cato v. United States*,
20 70 F.3d 1103, 1106 (9th Cir. 1995); *O’Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

21 **III. SCREENING OF COMPLAINT**

22 In his complaint, Fulkerson sues Defendants State of Nevada Department of
23 Business and Industry (the “Department”) and the Hartford Financial Insurance Group (the
24 “Hartford”) for violations of “federal and state injured workers rights,” violations of the
25 “Federal Employment Compensation Act,” and a violation of Fulkerson’s “rights to receive
26 medical treatment after being injured.” (See ECF No. 1-1 at 1.) Fulkerson alleges he was
27 injured on numerous occasions while at work and submitted workers compensation claims

1 to the Hartford but his claims were denied. (*Id.* at 1-3.) Fulkerson claims he is “being singled
2 out” by the Department due to previous lawsuits he has filed. (*Id.*) Fulkerson asks the court
3 to (1) investigate the claim handling of the Department, “impose an injunction,” and impose
4 internal review of their practices and (2) mediate and “inspect the proper documents and
5 medical notes” relating to his claims with Hartford. (*Id.* at 3.)

6 42 U.S.C. § 1983 provides a mechanism for the private enforcement of substantive
7 rights conferred by the Constitution and federal statutes. Section 1983 “is not itself a source
8 of substantive rights, but merely provides a method for vindicating federal rights elsewhere
9 conferred.” *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (internal quotation marks and
10 citations omitted). To state a claim under section 1983, a plaintiff must allege: (1) his or her
11 civil rights were violated, (2) by a person acting under color of state law. *West v. Atkins*, 487
12 U.S. 42, 48-49 (1988). To adequately plead the section 1983 elements, a complaint must
13 identify what constitutional right each defendant violated and provide sufficient facts to
14 plausibly support each violation. See e.g., *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir.
15 2002) (noting defendants must personally participate in misconduct to be liable under
16 section 1983). The “threshold inquiry in a § 1983 suit” requires courts “to ‘identify the specific
17 constitutional right’ at issue.” *Manuel v. City of Joliet*, 137 S.Ct. 911, 920 (2017) (citing
18 *Albright*, 510 U.S. at 271). “After pinpointing that right, courts still must determine the
19 elements of, and rules associated with, an action seeking damages for its violation.” *Id.*
20 (citing *Carey v. Piphus*, 435 U.S. 247, 257-58 (1978)).

21 First, the court recommends dismissal of the Department, with prejudice, as
22 amendment would be futile. Plaintiff cannot raise 42 U.S.C. § 1983 or state law claims
23 against the State of Nevada based on Eleventh Amendment sovereign immunity. See
24 *Brooks v. Sulphur Springs Valley Elec. Co-op.*, 951 F.2d 1050, 1053 (9th Cir. 1991) (holding
25 that “[t]he Eleventh Amendment prohibits federal courts from hearing suits brought against
26 an unconsenting state” and that “[t]he Eleventh Amendment’s jurisdictional bar covers suits
27 naming state agencies and departments as defendants, and applies whether the relief

sought is legal or equitable in nature”); see also *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 65 (1989) (holding that states are not persons for purposes of § 1983); see NRS § 41.031(3) (stating that the State of Nevada does not waive its Eleventh Amendment immunity). The Ninth Circuit has explicitly held that 28 U.S.C. § 1367, the supplemental jurisdiction statute, “does not abrogate state sovereign immunity for supplemental state law claims.” *Stanley v. Trustees of California State Univ.*, 433 F.3d 1129, 1133-34 (9th Cir. 2006).

Second, Fulkerson seems to assert bad faith claims against the Hartford. Under Nevada law, “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and execution.” *A.C. Shaw Constr. v. Washoe County*, 105 Nev. 913, 784 P.2d 9, 9 (1989) (quoting Restatement (Second) of Contracts § 205)). “The implied covenants of good faith and fair dealing impose a burden that require each party to a contract to refrain from doing anything to injure the right of the other to receive the benefits of the agreement.” *Shaw v. CitiMortgage, Inc.*, 201 F.Supp.3d 1222, 1251 (D.Nev. 2016) (quotation omitted). “An insurer breaches the duty of good faith when it refuses ‘without proper cause to compensate its insured for a loss covered by the policy.’” *Pioneer Chlor Alkali Co., Inc. v. Nat’l Union Fire Ins. Co.*, 863 F.Supp. 1237, 1242 (D.Nev. 1994) (quoting *United States Fid. & Guar. Co. v. Peterson*, 91 Nev. 617, 540 P.2d 1070, 1071 (1975)). To constitute a denial “without proper cause,” an insurer must have an “actual or implied awareness of the absence of a reasonable basis for denying the benefits of the policy.” *Am. Excess Ins. Co. v. MGM Grand Hotels, Inc.*, 102 Nev. 601, 729 P.2d 1352, 1354 (1986). In other words, an insurer’s incorrect determination that coverage does not exist under a particular policy is not an actionable tort unless there was no reasonable basis for that determination. *Pioneer*, 863 F.Supp. at 1242.

Fulkerson includes only the fact that he made various claims and the general assertion that the claims were not handled properly. This is insufficient to state a claim of bad faith against the Hartford as Fulkerson does not allege facts that the Hartford denied

1 coverage with an actual or implied awareness that there was no reasonable basis supporting
2 its decision. He merely asserts that they did not cover or pay his claims. Therefore, the bad
3 faith claim against the Hartford should be dismissed with leave to amend.

4 **IV. CONCLUSION**

5 For the reasons articulated above, the court recommends that Fulkerson's *in forma*
6 *pauperis* application (ECF No. 1) be granted, his motion to submit complaint (ECF No. 1-2)
7 be granted, and that his complaint (ECF No. 1-1) be dismissed, with prejudice, as to the
8 Department, and dismissed, with leave to amend, as to the Hartford.

9 The parties are advised:

10 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of
11 Practice, the parties may file specific written objections to this Report and Recommendation
12 within fourteen days of receipt. These objections should be entitled "Objections to
13 Magistrate Judge's Report and Recommendation" and should be accompanied by points
14 and authorities for consideration by the District Court.

15 2. This Report and Recommendation is not an appealable order and any notice
16 of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District
17 Court's judgment.

18 **V. RECOMMENDATION**

19 **IT IS THEREFORE RECOMMENDED** that Fulkerson's application to proceed *in*
20 *forma pauperis* (ECF No. 1) be **GRANTED**;

21 **IT IS FURTHER RECOMMENDED** that Fulkerson's motion to submit complaint (ECF
22 No. 1-2) be **GRANTED**;

23 **IT IS FURTHER RECOMMENDED** that the Clerk **FILE** the complaint (ECF No. 1-1);

24 **IT IS FURTHER RECOMMENDED** that Fulkerson's complaint (ECF No. 1-1) be
25 **DISMISSED, WITH PREJUDICE**, as to Defendant the State of Nevada Department of
26 Business and Industry;

27 **IT IS FURTHER RECOMMENDED** that Fulkerson's complaint (ECF No. 1-1) be

1 **DISMISSED, WITH LEAVE TO AMEND**, as to Defendant the Hartford; and

2 **IT IS FURTHER RECOMMENDED** that Fulkerson be given **thirty (30) days** from the
3 date of any order adopting and accepting this Report and Recommendation to file an
4 amended complaint correcting the deficiencies noted above. The amended complaint must
5 be complete in and of itself without referring or incorporating by reference any previous
6 complaint. Any allegations, parties, or request for relief from a prior complaint that are not
7 carried forward in the amended complaint will no longer be before the court. The Plaintiff
8 shall clearly title the amended pleading as "AMENDED COMPLAINT." Plaintiff should be
9 advised that if he fails to file an amended complaint within the thirty (30) days, the action
10 may be dismissed.

11 **DATED:** October 9, 2020.

12 
13 **UNITED STATES MAGISTRATE JUDGE**